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6 TERRY APPLING

7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**

10 TERRY APPLING,

CASE NO. CV 10-01900 LHK

11 Plaintiff,

12 v.

13 WACHOVIA MORTGAGE, FSB, *et. al.*
Defendants.

FIRST AMENDED COMPLAINT

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17 Plaintiff TERRY APPLING (hereinafter “Plaintiff”), by and through his counsel, for his
18 First Amended Complaint against Defendants WACHOVIA MORTGAGE, FSB, WORLD
19 SAVINGS BANK, FA, and WELLS FARGO BANK, NA, ETS SERVICES, LLC, IQ HOME
20 LOANS AND REALTY CORPORATION, ALI MIRZAEI and WILLIAM CHEN (collectively
21 hereinafter “Defendants”), alleges as follows:

22 **PARTIES**

23 1. This court has subject matter jurisdiction pursuant to 28 U.S.C. §1331 and 15
U.S.C. §1640(e). This is an action asserting violations of the Truth In Lending Act (“TILA”)
24 and Regulation Z (12 C.F.R. §226, *et seq.*), as well as additional claims under California State
25 Law. These claims all arise out of the same controversy and sequence of events.
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1 2. Venue is proper in this Court pursuant to 28 U.S.C. §1331(b)(1) in that one or
2 more of the Defendants reside in this judicial district and all defendants reside in the State of
3 California and 28 U.S.C. §1331(b)(2) in that a substantial part of the events or omissions giving
4 rise to the claim occurred in this District.

5 3. This Court has personal jurisdiction over the parties as all Defendants engage, or
6 did at all times relevant herein regularly engage, in business within the State of California and
7 the Northern District, or did at the relevant times set forth in this Complaint, and the acts
8 complained of herein all occurred within this District.

9 4. Defendants, and each of them, regularly engage, or did engage at all relevant
10 times, in business in the State of California and regularly provided loans or loan services to
11 residents of the State of California and this District who wished to obtain a mortgage loan

12 INTRADISTRICT ASSIGNMENT

13 5. Assignment to the San Jose Division is proper pursuant to Civ. L.R. 3-2(c) and
14 (d) because a substantial part of the events or omissions giving rise to the claim occurred in
15 Santa Clara County.

16 PARTIES

17 6. Plaintiff TERRY APPLING is a resident of Sunnyvale, Santa Clara County,
18 California. He was the owner of the property located at 175 N. Sunnyvale Avenue, Sunnyvale,
19 CA 94086 (the "Property").

20 7. Defendant WACHOVIA MORTGAGE, FSB ("WACHOVIA") is a national
21 federal savings bank. On information and belief, it was formerly known as WORLD SAVINGS.

22
23 8. Defendant WORLD SAVINGS BANK, FSB was, on information and belief, a
24 Federally Chartered bank with branches located throughout California, including Los Angeles.

25 9. Defendant WORLD SAVINGS BANK is the originating lender of the promissory
26 note and mortgage at issue in this matter and is believed to have been engaged in the business of
27 regularly extending or offering to extend consumer credit for which a finance charge is imposed

or which by written agreement is payable in more than four installments.

10. Defendant WACHOVIA is believed to be engaged in the business of regularly extending or offering to extend consumer credit for which a finance charge is imposed or which by written agreement is payable in more than four installments, and servicing of loan obligations. It was the successor in interest of WORLD SAVINGS.

11. Defendant WELLS FARGO BANK is a nationally chartered bank with branches located throughout California, including Santa Clara County, California. On information and belief, it acquired WACHOVIA in or about 2009.

12. On or about November 5, 2007 Plaintiff entered into an Fixed Rate Mortgage Note Pick-A-Payment Loan agreement (“Loan”) with Defendants to refinance an existing loan. The Loan was secured by Plaintiffs’ primary residence. The principal amount of the Loan was \$425,750.

FIRST CAUSE OF ACTION
VIOLATION OF TRUTH IN LENDING ACT
15 U.S.C. § 1601 et seq.
(Against the Bank Defendants)

13. Plaintiff realleges and incorporates Paragraphs 1 through 12 above.

14. The subject matter of this action is a negatively-amortizing loan – a loan whose principal grows over time because the payments provided for under the loan do not even cover accruing interest.

15. The Federal Reserve Board (FSB) has adopted regulations under the Truth in Lending Act (“TILA”) regarding such loans, which comprehensively regulate their content. These regulations were systematically violated by the terms of Plaintiff’s loan, as set forth below.

VIOLATIONS OF FSB REGULATIONS

Failure to Disclose that the Payment Schedule was not Based on the APR

16. 12 C.F.R. § 226.17 and 12 C.F.R. § 226.19 require the lender to make disclosures concerning the annual interest rate and payments in a clear and conspicuous manner. Further, a

1 misleading disclosure is as much a violation of TILA as a failure to disclose at all.

2 17. The loan terms violated 12 C.F.R. § 226.17 and 12 C.F.R. § 226.19 in that they
3 failed to clearly and conspicuously disclose the annual interest rate upon which the payments
4 listed in the Truth in Lending Disclosure Statement were based.

5

6 **Failure to Disclose the Certainty of Negative Amortization**

7 18. The FRB regulations require disclosure of the fact of negative amortization.
8 Where the amount by which payments can increase are capped in the loan, the lender must fully
9 disclose the rules relating to the cap, such as the fact that negative amortization will occur and
10 that the principal will increase (12 C.F.R. §226.19).

11 19. The lender stated in the Note and accompanying disclosures that negative
12 amortization was a mere possibility. Defendant concealed and failed to disclose the fact that the
13 loan terms *guaranteed* negative amortization if the payment schedule set forth in the TILA
14 Disclosure Statement were followed.

15 20. The foregoing information was objectively material and necessary for consumers
16 to make an informed decision because this information, if properly disclosed, would have
17 revealed that the loan's principal balance would increase if the payment schedule was followed,
18 thereby reducing their equity in their home and also rendering it impossible to refinance the loan
19 (for want of adequate equity). While the Note states the amount of Plaintiff's initial monthly
20 payments, the initial monthly *payment* amount stated in the Note is not related to the actual
21 amount accruing under the interest rate and payment cap identified in the Note and Disclosure
22 Statement.

23 21. Because of these violations, Defendants are liable to Plaintiff in the amount of
24 twice the finance charge, actual damages to be established at trial, and costs in accordance with
25 15 U.S.C. §1640(a).

1 WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

- 2 1. That judgment be entered in his favor and against Defendants, and each of them;
- 3 2. For twice the finance charges;
- 4 3. For attorneys' fees; and
- 5 4. For such other and further relief as the Court deems just and appropriate.

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7 DATED: Sept. 30, 2010

TRIAL & TECHNOLOGY LAW GROUP
A Professional Corporation
Attorney for Plaintiff
TERRY APPLING

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